

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)	
FOR REVIEW BY:)	CHARGE NO.: 2009SA0877
)	EEOC No. : 21BA83219
MICHAEL BERNINGER,)	ALS NO.: 09-0304
Complainant.)	

ORDER

This matter coming before the Commission by a panel of two, Commissioners Gregory Simoncini and Diane Viverito presiding, upon the Complainant's Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Department") of Charge No. 2009SA0877, Michael Berninger, Complainant, and Peoria Housing Authority, Respondent; and the Commission having reviewed *de novo* the Department's investigation file, including the Investigation Report and the Complainant's Request and supporting materials, and the Department's response to the Complainant's Request; and the Commission being fully advised upon the premises;

NOW, THEREFORE, it is hereby **ORDERED** that the Department's dismissal of the Complainant's charge is **SUSTAINED** on the following ground:

LACK OF SUBSTANTIAL EVIDENCE

In support of which determination the Commission states the following findings of fact and reasons:

1. The Complainant filed a charge of discrimination with the Department on September 24, 2008, in which he alleged that the Respondent laid him off because of his physical disability (aneurysm of the lower abdomen), and his age (60 years old), in violation of Section 2-102(A) of the Illinois Human Rights Act (the "Act"). The Department dismissed the charge on June 5, 2009, after finding that there was no substantial evidence of discrimination. The Complainant thereafter filed a timely Request on June 9, 2009.
2. The undisputed evidence in the investigation file shows that the Complainant had previously voluntarily terminated his position with the Respondent as a Security Guard

on July 19, 2007. On September 7, 2007, the Complainant was rehired by the Respondent as a Security Guard, Grade 10.

3. Pursuant to Section 10.2 of the Respondent's Collective Bargaining Agreement ("CBA"), wherein "seniority" is defined as ... "the length of continuous employment with the Authority," the Complainant's seniority date was considered to be September 7, 2007.

4. Including the Complainant, there were three security guards at his work location. One of the security guards (age 48) was also classified as a Grade 10, and he had the most seniority of the three. The third and youngest security guard (under 40, non-disabled) was a supervisor, and he was classified as a Lead Security Guard, Grade 14.

5. The CBA specified the manner in which bargaining unit members, such as the Complainant and the other two security guards, were required to be laid off. For example, it specified that the employee with the least seniority in the affected department would be the first to be removed.

6. The CBA also defined "bumping" rights for employees who sought to avoid a layoff, meaning the employee could obtain a new position either within his same department and in the next lowest job classification, or within a different department. When "bumping" within his same department, the affected employee could not "bump" someone with greater seniority. If the affected employee wished to "bump" into a different classification in a different department, then the affected employee must have previously held the position and must have had a satisfactory performance review.

7. On August 27, 2008, while on medical leave, the Complainant received a layoff notice, dated August 18, 2008. The layoff notice stated that his Security Guard, Grade 10 position was being eliminated effective September 1, 2008. The notice informed the Complainant that he would have the opportunity to interview for open positions.

8. The Respondent allowed the Complainant to exercise his "bumping" rights to move to a Leasing Occupancy Specialist, Grade 16 position. However, the Respondent did so in violation of the CBA because the Complainant had not previously held the position of Leasing Occupancy Specialist; he had always been employed by the Respondent as a security guard. Therefore, because the Complainant could not retain the Leasing Occupancy Specialist Grade 16 position, and there were no other eligible vacant positions to which the Complainant could "bump," the Respondent laid off the Complainant on September 3, 2008.

9. The Respondent had also improperly allowed the 48-year-old Security Guard, Grade 10 to "bump" the Lead Security Guard, Grade 14 supervisor. Upon correcting this error, the Respondent laid off the 48-year-old Grade 10 security guard, and rehired the Lead Security Guard.

10. The Complainant alleged that he was laid off from the position of Leasing Occupancy Specialist because of his age and his disability. In his Request, the Complainant argues that under the CBA, an affected employee may exercise his “bumping rights” into a new department whether or not he had ever worked there before. The Complainant also argues that when his fellow 48-year-old Grade 10 Security Guard was laid off, the Respondent was aware that the 48-year-old security guard had a heart condition.

11. The Commission’s review of the Department’s investigation file leads it to conclude that the Department properly dismissed the Complainant’s charge for Lack of Substantial Evidence.

12. The Commission finds that the Complainant misapprehends the CBA rules regarding “bumping.” Under the CBA, the Complainant had no right to “bump” to the Leasing Occupancy Specialist position because he lacked the requisite seniority, and he had never previously occupied that position. There is no other evidence in the file that the Respondent’s stated reason for removing the Complainant from the Leasing Occupancy Specialist position was a pretext for age or disability discrimination.

13. Accordingly, it is the Commission’s decision that the Complainant has not presented any evidence to show that the Department’s dismissal of his charge was not in accordance with the Act. The Complainant’s Request is not persuasive.

THEREFORE, IT IS HEREBY ORDERED THAT:

The dismissal of Complainant’s charge is hereby **SUSTAINED**.

This is a final Order. A final Order may be appealed to the Appellate Court by filing a petition for review, naming the Illinois Human Rights Commission, the Illinois Department of Human Rights, and the Respondent Peoria Housing Authority as appellees, with the Clerk of the Appellate Court within 35 days after the date of service of this order.

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

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Entered this 7th day of October 2009.

Commissioner Gregory Simoncini

Commissioner Diane Viverito